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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MOISES MORALES LOPEZ, Defendant and Appellant.	E033025 (Super.Ct.No. INF 37704) O P I N I O N

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Ward Stafford Clay, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Holley Hoffman and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant was charged and convicted of vehicular manslaughter (Pen. Code, § 192, subd. (c)(3); count I),[1] driving while intoxicated and causing injury (Veh. Code, § 23153, subd (a); count II), driving while having .08 percent or more, by weight, of alcohol in his blood and causing injury (Veh. Code, § 23153, subd. (b); count III), and driving with .05 percent or more, by weight, of alcohol in his blood while under age 21 (Veh. Code, § 23140, subd. (a); count IV). The jury also found true several great bodily injury and multiple victim enhancements. (§ 12022.7, subd. (a); Veh. Code, § 23558.) Defendant was sentenced to eight years in prison.[2]

The charges stemmed from a one car drunk driving accident that occurred during the early morning hours of February 9, 2001. Defendant, then 18, was driving eastbound on the Interstate 10 freeway with five underage passengers. As he approached another vehicle from behind at a high rate of speed, he drove off the freeway and rolled down an embankment into a wash. One passenger, Escarlet Valenzuela, age 15, was killed. Defendant and the other passengers were seriously injured.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The sentence consisted of the low term of 16 months on count III, plus an eight-month term on count I. Two consecutive three-year terms were added for the great bodily injury and multiple victim enhancements on count III. Additional terms and enhancements were imposed but stayed on counts II and IV.

Defendant appeals, raising two contentions. First, he contends that his double jeopardy rights were violated because a first jury that was impaneled and sworn on June 5, 2002, was discharged without his consent or legal necessity. He was convicted by a second jury that was impaneled and sworn on June 18, 2002. We reject this contention because the record shows that defendant consented to discharge the first jury, both personally and through his counsel, after his trial counsel became ill and the first jury was unavailable during the following week.

Second, defendant contends the trial court erred in failing to give a unanimity instruction (e.g., CALJIC No. 17.01) on counts II, III, and IV. He argues that the jury could have convicted him on these counts based on one of two Vehicle Code violations: (1) Vehicle Code section 21658, subdivision (a) (failure to drive within one lane) and/or (2) Vehicle Code section 22350 (basic speed law). We reject this contention because the evidence showed that defendant was both speeding and made an unsafe lane change as he drove off the freeway, causing the accident.

FACTS

About 1:00 a.m., Raymond Arellano was driving eastbound on Interstate 10, at 70 miles per hour, approaching Monroe Street. He noticed a car in his rearview mirror, "approaching pretty fast." As the car approached, it changed lanes and "swerved off" the freeway into the emergency lane, down an embankment, and into a wash before the Monroe Street bridge. Arellano said the car came within five feet of him before it

changed lanes without slowing down. Arellano stopped his car and ran down into the wash. As he came back to the freeway to look for a call box, he waved down two highway patrolmen. Defendant, who was driving the car, had a blood alcohol level of .14 percent, by weight, at the time of the accident.

DISCUSSION

A. *Double Jeopardy Did Not Bar Defendant's Second Trial Because He Consented to Discharge the Jury in His First Trial, Both Personally and Through His Counsel*

Defendant contends his second trial was barred by double jeopardy because he did not consent to nor was there a legal necessity for the trial court's discharge of the jury in his first trial. We disagree.

We first note that defendant has failed to preserve his double jeopardy claim for purposes of this appeal. (§ 1016, cl. (5).) "The general rule is that 'former jeopardy [must] be affirmatively pleaded, . . . or any claim on that ground is not preserved for review. (*People v. Belcher* (1974) 11 Cal.3d 91, 96 [*Belcher*].)'" (*People v. Gurule* (2002) 28 Cal.4th 557, 646; *People v. Memro* (1995) 11 Cal.4th 786, 821.) Defendant failed to enter a special plea of former jeopardy before his second trial.

Nevertheless, we address the merits of defendant's claim to demonstrate that his counsel did not render ineffective assistance by failing to enter the plea. (*Belcher, supra,* 11 Cal.3d at pp. 96-99 [failure to raise meritorious plea of former jeopardy denied the defendant effective assistance of counsel]; see also *People v. Marshall* (1996) 13 Cal.4th

799, 824, fn. 1.) We conclude that the second trial did not violate defendant's double jeopardy rights, because defendant consented to discharge the jury in his first trial, both personally and through his counsel. Thus, a plea of former jeopardy before defendant's second trial would not have had merit.

The double jeopardy clauses of the federal and state Constitutions bar a retrial of a defendant following his acquittal. (*People v. Batts* (2003) 30 Cal.4th 660, 679; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712.) The discharge of a sworn jury without a verdict is equivalent to an acquittal and bars retrial, unless the defendant consents to the discharge or legal necessity requires it. (*Ibid*.; *People v. Hernandez* (2003) 30 Cal.4th 1, 5; § 1023.) Legal necessity exists, for example, "where physical causes beyond the control of the court such as the death, illness or absence of a judge, juror or the defendant make it impossible to continue. [Citation.] Legal necessity has also been found where it becomes necessary to replace defense counsel during trial due to the disappearance of counsel at a critical stage of trial . . . ." (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175; § 1141.)

A defendant may also consent, either expressly or impliedly, to discharge the jury. "[A]ffirmative conduct by the defendant may constitute a waiver if it clearly evidences consent . . . ." "[A] waiver will a fortiori be implied when the defendant actually initiates or joins in a motion for mistrial [citation]." (*Curry v. Superior Court, supra,* 2 Cal.3d at p. 713.) "Consent to mistrial may [also] be implied from affirmative conduct, such as

moving for mistrial or stating that there is no objection to mistrial . . . ." (*People v. Brandon, supra,* 40 Cal.App.4th at p. 1175.) But consent will not be inferred from silence, failure to object to a proposed order of mistrial, or simply bringing a matter to the court's attention. (*People v. Compton* (1971) 6 Cal.3d 55, 62-63; *People v. Chaney* (1988) 202 Cal.App.3d 1109, 1115-1118.)

Consent may be implied, however, when a defendant reasonably leads a trial court to believe he is consenting to a mistrial. In *People v. Kelly* (1933) 132 Cal.App.118, 122-124 (*Kelly*), it was held that the trial court reasonably concluded that defendant consented to a mistrial, based on his counsel's statement that "this case should either result in a mistrial or directed verdict." The *Kelly* court reasoned: "[T]he statements made were such as would naturally lead the court to believe that the defendant consented to a mistrial order. . . . Even if the statements made are capable of a double construction, they should be viewed in the light of the circumstances in which they were uttered and with a view of determining what was intended. Thus viewed . . . the statements made were such as to justify the court in believing that an order of mistrial was consented to." (*Id*. at p. 123.)

Defendant maintains he did not consent to discharge the jury in his first trial *before the first jury was discharged*. He argues that "[i]t was not until after the court denied [his] trial counsel's motion to continue the trial one week did [he] agree to allow a

discharge of the trial jury." Thus, he argues, "having no real choice," he "reluctantly agreed" to discharge the first jury. Defendant's argument misstates the record.

An amended information was filed on June 4, 2002, charging defendant with all charges of which he was ultimately convicted. Defendant pleaded not guilty. On June 5, defendant's first jury was chosen and sworn, the amended information was read, and some instructions were given. Witnesses were scheduled to be called on the following Monday, June 10. On June 10, defendant's trial counsel was ill.

On June 10, the trial court informed the jury that Ms. Goldstein was present for trial counsel, Mr. Soda. The trial court then said: "We had a meeting before we started. Mr. Soda, counsel for [defendant], is ill, and would not be available, at the earliest, until June 17th, if then. So we're going to -- undoubtedly, we're going to have to take a waiver and release the jury, but we can talk with the jury a little bit and see what they would like to do. . . ."

After briefly discussing the availability of some witnesses, the trial court said, "For the record, Miss Goldstein, what's Mr. Soda's preference as far as waiving double jeopardy and time . . . ." Ms. Goldstein responded, "*Well, Mr. Soda's preference would be to first, maybe, take that poll from the jury, determine if the jury could be available next week, then proceed to start the jury trial on the 17th. If that is not possible, then we could still attempt to keep it in this department and start the trial again on the 17th,*

depending on his medical condition, and pick a new jury. [¶] *And as far as double jeopardy, I don't see that, really, there is a double jeopardy issue.*" (Italics added.)

The trial court next determined that eight jurors would not be available during the week of June 17th. The trial court noted, "I have [eight] no[']s and I can't make that up with the two alternatives, so I'm afraid we can't proceed, Miss Goldstein." The trial court then admonished defendant that, *if* the jury was discharged, "it could be an issue as to whether or not you can be subjected to double jeopardy. . . . [¶] *In order to release this jury and continue this matter to a date in the future, you have to tell me that you are willing to waive your speedy trial right and you're willing to waive any issue as to double jeopardy* . . . ." (Italics added.)

Defendant waived both rights. Regarding double jeopardy, the trial court asked defendant, "You waive any issue as to possible double jeopardy if we release this jury and pick a new one?" Defendant responded "[y]es." The trial court then discharged the jury. On June 18, a new jury was chosen and sworn, without defendant having entered a plea of former jeopardy.

Thus, defendant unequivocally, expressly, and personally consented to discharge the jury and waived his double jeopardy rights on June 10. Additionally, Ms. Goldstein waived defendant's double jeopardy rights *before defendant personally waived them* by telling the trial court that a new jury could be chosen if the first jury was unavailable on June 17. (*People v. Brandon, supra,* 40 Cal.App.4th at p. 1175 [trial counsel may waive

an accused's double jeopardy rights as a matter of trial tactics].) In any event, the record shows that the trial court did not discharge the jury until *after* defendant consented to the discharge, both personally and through his counsel.[3]

B. *No Unanimity Instruction Was Required on Counts I, II, or III*

Defendant contends the trial court erred in failing to give a unanimity instruction (CALJIC No. 17.01)[4] on counts I, II, and III. He argues that the prosecutor relied on two "separate and distinct acts" to prove each count: (1) a violation of Vehicle Code section 21658, subdivision (a) (failure to drive within one lane) and/or (2) Vehicle Code section 22350 (basic speed law). We conclude that no unanimity instruction was required on any of the counts because the evidence showed that defendant simultaneously violated both Vehicle Code sections; he was speeding as he drove off the freeway, causing Valenzuela's death and great bodily injuries to other passengers.

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[3] Because defendant consented to discharge the jury in his first trial, a special plea of former jeopardy before his second trial would not have had merit, and we need not reach the question whether a legal necessity compelled the first jury's discharge.

[4] CALJIC No. 17.01 reads as follows: "The defendant is accused of having committed the crime of _____ [in Count __]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count __] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count __], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

A unanimity instruction must be given sua sponte where the evidence adduced at trial shows that more than one act was committed which could support an element of a charged offense, and the prosecutor has not relied on any single act. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275.) But "no unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction . . . ." (*Id*. at p. 275; *People v. Rae* (2002) 102 Cal.App.4th 116, 122.) Similarly, a unanimity instruction is not required when there is no danger that jurors will rely on different acts in finding a defendant guilty. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 [no unanimity instruction required on first degree robbery-murder charge because testimony established that either two robberies or none occurred].)

Here, the evidence unequivocally showed that defendant simultaneously violated both Vehicle Code sections; he was speeding *as* he drove off the freeway. Arellano testified that as he was driving at 70 miles per hour, defendant's car approached him from the rear "pretty fast," then drove off the freeway. Thus, there was no danger that some of the jurors could have relied on one Vehicle Code section, but not the other, in finding defendant guilty on counts I, II, or III. Accordingly, the trial court did not err in failing to give CALJIC No. 17.01 on counts I, II, or III.

DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.